No. 79-2059

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1979

AMERICAN ELECTRIC POWER COMPANY, INC.,
AMERICAN ELECTRIC POWER SERVICE CORPORATION, and
INDIANA & MICHIGAN ELECTRIC COMPANY,
Corporations,

Petitioners,

v.

CITY OF MISHAWAKA, INDIANA,
CITY OF NILES, MICHIGAN,
CITY OF COLUMBIA CITY, INDIANA,
CITY OF BLUFFTON, INDIANA,
CITY OF GARRETT, INDIANA,
CITY OF GAS CITY, INDIANA,
TOWN OF FRANKTON, INDIANA,
TOWN OF WARREN, INDIANA,
TOWN OF NEW CARLISLE, INDIANA, and
TOWN OF AVILLA, INDIANA,
Municipal Corporations,

Respondents.

PETITIONERS' REPLY BRIEF

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1. As to the novelty and impact of the holdings below

Stripped of its rhetoric, Respondents' Brief in Opposition supports Petitioners' view that the courts below have announced novel rules of general applicability and overwhelming importance to the electric utility industry, rules that will affect the rate-making decisions of every utility which must petition the Federal Commission for cost-justified rate increases.

Respondents would extol "the value of these decisions in alerting electric utility companies to the risks of monopolistic behavior . . . ." Respondents' Brief 19. Now that utilities have been alerted, they say, to the risk that federal rate petitions may engender liability under both the antitrust laws as well as the Federal Power Act despite scrupulous adherence by the utilities to the rules and regulations of the Federal Commission, all utilities will be able to comply easily and willingly with the extra-regulatory procedures imposed by the courts below, with the result that these issues will never arise again and this Court need never scrutinize them. Respondents' Brief 19. If, as Respondents argue, the newly created risk of antitrust liability assures that every federal rate petition will henceforth comply with the Seventh Circuit's first impression interpretations of the Federal Power Act, the Sherman Act and this Court's *Conway* decision,* the effect of the decisions below is certainly far-reaching and immediate. The argument that this case will apply generally as a deterrent cannot be squared, however, with Respondents' conflicting assurances that this case is of narrow interest by reason of its "unique facts". Respondents' Brief 6. The pendency of at least ten other "price squeeze" actions also arising in the electric utility

* *FPC* v. *Conway Corp.*, 426 U.S. 271 (1976).

industry (Petition 12 n.) and the pendency of numerous "price squeeze" claims before the Federal Commission clearly indicate that *Mishawaka II* raises issues of broad significance. Indeed, review is needed precisely because the rules of law announced below affect directly the rate mechanisms of an entire regulated industry and because, unless reviewed and rejected by this Court, every utility will be at peril to attempt to comply with them.

2. As to the burdens on antitrust courts and utilities

Respondents urge that the newly created obligation to tailor federal rates to the level of state rates, or to "justify" the difference (by some means additional to the cost of service studies required by the Federal Commission), is a simple procedure that is "not onerous" (Respondents' Brief 19, 23), and that therefore the issues raised in the Petition are of transient interest. Respondents would have this Court believe that antitrust courts will not be faced with questions as to the sufficiency of a utility's compliance with those obligations. But serious questions clearly remain. For example, what rates should a utility compare in considering the impact upon competition of rates that are otherwise cost-justified (the rates compared in the only "price squeeze" evidence adduced below were held to be not comparable as a matter of law); what constitutes "justification" for a federally accepted rate that may be higher than a state rate (the cost of service studies required by the Federal Commission were obviously deemed insufficient justification below); and to what extent may the federal filing requirements be overridden by this new standard created by an antitrust court in derogation of the existing regulatory scheme created by Congress? Respondents' argument that, under *Mishawaka II*, utilities may avoid

antitrust liability merely by "satisfy[ing] themselves" that rate disparities are "necessary and can be justified" (Respondents' Brief 23) finds no support in *Mishawaka II*, either at the page cited by Respondents (14a) or elsewhere. *Cf.* 13a, 19a-20a.

The new rate filing requirements announced by the courts below impose on electric utilities a further burden, both onerous and unfair, in that any utility which foregoes seeking a portion of the full rate relief justified by cost of service studies, in order to avoid the risk of antitrust liability, loses for all time the right to claim the difference. *See* Petition 22. Moreover, since the Federal Commission has no power to grant an increase higher than the increase sought by the utility (*see* Petition 22), the restriction on utility petitions for rate relief imposed by the courts below necessarily limits the Federal Commission's power even to consider the full measure of rate relief justified by cost of service studies.

3. As to a federal refund constituting a monopolistic overcharge

Respondents' Brief treats this case as though it dealt solely with an anticompetitive "price squeeze" of the *Conway* type (*i.e.*, the difference between federally and state regulated rates), although *Mishawaka II* held that the assumptions which underlay the only evidence offered to show a "price squeeze" were "totally without foundation" (26a-27a). Respondents thus attempt to evade the ramifications of applying a "monopolistic overcharge" theory to an industry in which pervasive regulation of rates assures that no utility "monopolist" will have the power to control prices—the *sine qua non* of a "monopolistic overcharge" case. Respondents' entire discussion of what

Mishawaka II says (Respondents' Brief 14-15) glosses over the fundamental and conceptual problem of treating refunds under the Federal Power Act as "monopolistic overcharges" under the antitrust laws. *See* 28a. Respondents understandably dismiss in a footnote the clear holding of *Mishawaka II* that antitrust injury and damages both arise and flow from the monopolistic overcharge. *Compare* Respondents' Brief 14 n.9 *with Mishawaka II,* 27a, 29a-30a. They ignore the consequences such a holding has on the electric utility industry and on the statutory scheme enacted by Congress for its regulation.

4. As to the paramount importance of the rate issues

Respondents criticize Petitioners for seeking to "isolate their rate practices from their other anticompetitive acts and practices . . . ." Respondents' Brief 2. To the extent that the Petitioners have done that, it was to emphasize that regulated rates are the crux of this controversy, and that they cannot be mixed in a "monopoly broth" (*see* 24a) without separate consideration of the constitutional and regulatory protections surrounding them, as well as of the nature of the utility's "monopoly" insofar as rates are concerned. The regulated rate issues are properly highlighted because in no case decided by this Court has a determination been made (1) as to the applicability of the *Noerr-Pennington* doctrine to federal petitions for rate increases, (2) as to the existence of a direct and unavoidable conflict between the Sherman Act and the ratemaking jurisdiction of the Federal Commission under the Federal Power Act, or (3) as to the existence or the scope of a state action defense, under *Parker* v. *Brown,* 317 U.S. 341 (1943), to allegations of a "price squeeze"

created by the action of state regulatory agencies in lowering the rates sought by a utility. These rate-related issues are also central to the result and to the holdings below, because *Mishawaka II* expressly states that Petitioners' other acts would not in themselves amount to an antitrust violation. 22a, 23a-24a.

5. As to the *Noerr-Pennington* issues

Respondents treat this Court's *Noerr-Pennington* doctrine as one of statutory construction, and proceed to invoke the presumption against "implied repeal". Respondents' Brief 11-13. In so doing, Respondents confuse a constitutional limitation on congressional power with an implied repeal based on congressional intent.* *Noerr-Pennington* is not a statutory but a constitutional doctrine, founded in the basic right to petition government for a redress of grievances, guaranteed by the First Amendment. In urging a narrow scope for the protection of the *Noerr-Pennington* doctrine, one that would exclude the rate filings at issue, Respondents part company with the decision they are seeking to uphold. *Mishawaka II* concedes the applicability of the doctrine *ab initio,* but declines to apply it because of the "combination" of the rate petition filings with other acts that in its view were not constitutionally protected. 17a.** Respondents gloss over the amalgamation of pro-

* That confusion also infects Respondents' Brief at 9 n.5.

** The courts below also declined to apply the *Noerr-Pennington* doctrine to Petitioners' non-sham petitions for rate relief because in its view Petitioners did not comply with an obligation, first announced in the courts below, that utilities govern their filings by competitive considerations. Accordingly, the courts below found that Petitioners had violated the Federal Power Act (13a, 15a-16a), a statute which confides exclusive enforcement powers to the Federal Commission. That result reflects an erroneous assumption that the First Amendment, which limits the scope of the Sherman Act under the *Noerr-Pennington* doctrine, is somehow less applicable to the scope of the Federal Power Act.

tected and unprotected acts, explicitly barred by *United Mine Workers* v. *Pennington,* 381 U.S. 657, 670 (1965), by baldly asserting that, in "regulated entity" cases, *Noerr*-protected acts lose their constitutional protection when unprotected anticompetitive acts are also shown. Respondents' Brief 11 n.6. However, the only case they cite for that proposition, *Wilmorite, Inc.* v. *Eagen Real Estate, Inc.,* 454 F. Supp. 1124, 1136(N.D.N.Y. 1977), *aff'd without opinion,* 578 F.2d 1372 (2d Cir.), *cert. denied,* 439 U.S. 983 (1978), arose from a zoning dispute involving the development of shopping malls (a non-regulated industry), and the *dictum* from that case on which Respondents rely does no more than loosely characterize the holdings of *other* cases, on which Respondents obviously prefer not to rely. Indeed, in *Wilmorite,* the court dismissed the complaint on *Noerr-Pennington* grounds; that case does not in any way contradict Petitioners' analysis of that doctrine.

6. As to the exclusive jurisdiction issues

Respondents imply that this Court's refusal to grant certiorari to review the preliminary jurisdictional motion in *Mishawaka I* militates against such review now. Respondents' Brief 13. First, the denial of certiorari had no determinative or other significance; second, there has now been developed a full record after a trial in which Respondents chose to proceed on a theory which is different from the theory involved in *Mishawaka I* and which creates a sharper clash between the Sherman Act and the regulatory scheme.

It is therefore inappropriate for the Respondents to suggest that the Solicitor General's recommendation that certiorari be denied in *Mishawaka I* should be adopted on

this Petition, in the absence of any further view from the Solicitor General. Indeed, the disposition of this case in *Mishawaka II* is in direct conflict with at least some of the views expressed in the Solicitor General's Brief for the United States as Amicus Curiae in this Court's Docket No. 77-689. For example, the Solicitor General presented the "price squeeze" views of the Federal Commission as follows:

> "If, in its pending proceeding, the Commission were to conclude under *Conway* that the differential between wholesale and retail rates is justifiable and not the product of anticompetitive manipulation, and therefore approved the wholesale rate as just and reasonable, established ratemaking principles indicate to the Commission that a court would be bound by such a determination."

Brief for the United States as Amicus Curiae at 18, *Indiana & Michigan Electric Co.* v. *City of Mishawaka,* 436 U.S. 922 (1978). The decisions below are at war with that position.

The Solicitor General's Brief on *Mishawaka I* dealt solely with the "price squeeze" claim of the original complaint. The Solicitor General did not address the narrower issue of whether or not a federal court, acting under the antitrust laws, may regulate the level, the cost justification and the justness and reasonableness of rates sought on rate petitions to regulatory agencies.

7. As to the "state action" exemption

Respondents place major reliance on their argument that the "state action" exemption does not apply here because neither the State of Indiana nor the State of Michigan has

sanctioned a "price squeeze". Respondents' Brief 20-21. Petitioners made no claim that a "price squeeze" was so sanctioned. Rather, Petitioners submit that it was the action of the state commissions, not of the Petitioners, which created any differentials between federal and state rates—the differentials which ground the "price squeeze" claim—by granting rate relief at a level lower than that sought by Petitioners. The Petition (at 26-27) reflects the view previously expressed in the Solicitor General's Brief (at 14 n.5) that, if this is a *Conway* "price squeeze" case, the actions taken by the state commissions might be shown at trial to have constituted "state action" within the meaning of *Parker* v. *Brown, supra.* The record and the opinion in *Mishawaka II* (28a n.16) establish that Petitioners have met this burden, and this crucial issue of nationwide importance is now ready for consideration by this Court.

8. As to the award of "litigation expenses" as part of a treble damage recovery

Respondents claim that Petitioners failed to cite *Alyeska Pipeline Service Co.* v. *Wilderness Society,* 421 U.S. 240 (1975), to the court below, and that Petitioners' attempt to obtain review here of the Seventh Circuit's award of administrative "litigation expenses" as treble damages is therefore precluded. Respondents' Brief 27-28. There is no such rule. Petitioners squarely addressed the issue in their brief on Respondents' cross-appeal. Petitioners addressed the issue again on their petition for rehearing in the Seventh Circuit and there cited *Alyeska* and relied upon it.

We believe *Alyeska* governs the result here. Congress made no provision in the Federal Power Act for the award

of attorneys' fees to any party in proceedings before the Federal Commission. In this case, "litigation expenses" in proceedings that have not yet been finally determined by the Federal Commission were awarded as treble damages. The argument made by Respondents is nothing more than an attempt to obtain by indirection a treble damage recovery for "litigation expenses" incurred in proceedings conducted pursuant to a statute which provides no authority even for a single recovery.

Conclusion

Based on all of the foregoing, Petitioners respectfully pray that their Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit be granted.

Respectfully submitted,

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